PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

April 4, 2005

TO: PARTIES OF RECORD IN INVESTIGATION 03-10-038

This proceeding was filed on October 16, 2003, and is assigned to Commissioner Geoffrey F. Brown and Administrative Law Judge (ALJ) John E. Thorson. This is the decision of the Presiding Officer, ALJ Thorson.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 8.2 of the Commission's Rules of Practice and Procedure.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ ANGELA K. MINKIN by LTC_
Angela K. Minkin, Chief
Administrative Law Judge

ANG:hkr

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Attachment

ALJ/JET-POD/hkr

PRESIDING OFFICER'S DECISION (Mailed 4/4/2005)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations and Practices of the Conlin-Strawberry Water Co. Inc. (U-177-W), and its Owner/Operator, Danny T. Conlin; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Petition the Superior Court for a Receiver to Assume Possession and Operation of the Conlin-Strawberry Water Co. Inc. pursuant to the California Public Utilities Code Section 855.	Investigation 03-10-038 (Filed October 16, 2003)

Thomas J. MacBride, Jr., Attorney at Law, for Conlin-Strawberry Water Company Inc. and Danny T. Conlin, respondents.
Cleveland Lee, Attorney at Law, for Water Division.

PRESIDING OFFICER'S DECISION AUTHORIZING PETITION FOR RECEIVER AND ORDERING REPARATIONS

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PRESIDING OFFICER'S DECISION AUTHORIZING PETITION FOR RECEIVER AND ORDERING REPARATIONS

I. Summary

The Commission issued an Order Instituting Investigation (OII), Notice of Opportunity for Hearing, and Order to Show Cause directed to Conlin-Strawberry Water Company Inc. (Conlin-Strawberry *or* company) and Danny T. Conlin (Conlin), its owner (sole shareholder) and operator, respondents. The OII required respondents to provide certain information to the Commission; show cause why the Commission should not petition the Tuolumne County Superior Court for the appointment of a receiver to assume possession of the company and its water system; and demonstrate why fines, penalties, and other remedies should not be imposed upon them.

Conlin-Strawberry is located in an unincorporated area of Tuolumne County, near State Highway 108 and the Sonora-Mono Highway. The company provides water to the Strawberry subdivision and the Dymond's Strawberry Ridge subdivision. As of April 2004, the water system had 360 connections. Eighty-four percent of the property owners with connections are members of the Strawberry Property Owners' Association (Association).[1]

In this decision, the Presiding Officer determines that certain of the OII's allegations have been proven by a preponderance of the evidence and that the Commission should petition the Superior Court for the appointment of a receiver to assume possession and operation of the water system. Additionally, the

[1] Ex. No. 15: Strawberry Property Owners' Association Newsletter at 1 (April 2004).

Presiding Officer orders reparations of approximately $107,000 (including interest), for illegally collected rate surcharges, from the company.

II. Procedural History

The OII was approved by the Commission on October 16, 2003, and mailed to respondents on October 21, 2003. As allowed by the Commission's *Rules of Practice and Procedure* (Rules), respondents did not file a response to the OII; but they appeared at the initial Prehearing Conference (PHC) held on December 18, 2003. The Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge (ALJ) was issued on January 9, 2004.

Additional PHCs were held for case management and law and motion purposes on March 12, May 10, and May 20, 2004. Additional law and motion hearings on discovery issues and other pending motions were held on March 30, April 13, and May 3, 2004.

The evidentiary hearing in the proceeding extended over ten days during spring and summer 2004 (May 11, May 25-27, June 24-25, July 6, July 14, August 19, and September 2) producing a transcript of over 1,300 pages and 123 offered exhibits. The following persons testified during the evidentiary hearing:

- William Rugg, ratepayer and President, Strawberry Property Owners' Association (May 11, 2004)
- Kerrie Kathryn Evans, Water Division (May 25, May 27, June 24-25)
- Danny T. Conlin, Respondent (May 26; taken out of order for witness's convenience)
- Edward Lodi, ratepayer (June 24)
- Frank Helm, ratepayer (June 24)
- Dennis Kelley, ratepayer (June 25)

- Herbert Chow, Water Division (July 6, July 14, August 19, September 2)
- Fred L. Curry, Water Division (July 14)
- James Pingree, water system operator (August 19)

The parties subsequently engaged in extensive post-hearing briefing. The briefing schedule was delayed, at all parties' request, to allow discussion of a settlement involving the sale of the water system to a prospective buyer. A settlement was not reached, and final reply briefs were filed on January 18, 2005. The matter was submitted on that day.

Under Public Utilities Code Section 1701.2(d), the Commission is required to resolve adjudicatory cases within 12 months of initiation unless the Commission determines that the deadline cannot be met.[2] On August 19, 2004, the Commission determined that this proceeding could not be resolved within 12 months of initiation (*i.e.*, by October 15, 2004) without affecting both the parties' rights to call and cross-examine witnesses and the Presiding Officer's need for necessary evidence available only from a witness yet to be heard. The Commission, therefore, issued its Order Extending Statutory Deadline as authorized by Section 1701.2(d).[3]

III. OII Background

The Conlin-Strawberry water system has an extensive history with the Commission. The water system first received a certificate of public convenience

[2] Unless other indicated, statutory sections cited are codified in the Public Utilities Code.

[3] *In re* Conlin-Strawberry Water Co., Inc., Decision (D.) 04-08-029, 2004 Cal. PUC LEXIS 324 (Aug. 19, 2004).

and necessity from the Commission in 1963.[4] The company was part of Miriam E. Conlin's estate when she died in the early 1980s.

A. 1982-83 General Rate Case

In 1982, the company applied to the Commission for general ratemaking and permission to apply for Department of Water Resources (DWR) loans. Before acting on these requests, the Commission apparently required that the company's ownership be ascertained. Danny T. Conlin, Miriam's son and the executor of her estate, also applied to the Commission for approval to transfer the water system to a newly formed California corporation, the Conlin-Strawberry Water Company Inc. The Commission approved this transfer in 1983.[5]

Shortly thereafter, the Commission approved a general rate increase, authorized the company to borrow no more than $411,200 from the DWR Safe Drinking Water Bond Act (SDWBA) loan program (to be repaid in 35 years or less), and also approved a rate surcharge to cover the repayment of the loan.[6] In 1986, the Commission authorized the company to borrow additional $51,500 from the SDWBA fund.[7]

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[4] *In re* Conlin (Conlin Strawberry Water Co.), D.66037, 61 CPUC 426 (Sept. 17, 1963); *see also* Strawberry Property Owners' Ass'n v. Conlin-Strawberry Water Co., D.96-09-043, 1996 Cal. PUC LEXIS 910 (Sept. 4, 1996).

[5] *In re* Danny T. Conlin, Executor, D.83-03-007, 1983 Cal. PUC LEXIS 624 (Mar. 3, 1983).

[6] *In re* Conlin-Strawberry Water Co., D.83-05-052, 1983 Cal. PUC LEXIS 916 (May 18, 1983).

[7] *In re* Conlin-Strawberry Water Co., D.86-11-004, 1986 Cal. PUC LEXIS 670 (Nov. 5, 1986).

Many of the issues pending in this proceeding first arose during the 1982-83 general rate case. The Commission's staff prepared a report discussing water pressure problems, the need for an answering service or machine to handle emergency calls from customers, and the need for a comprehensive plan to undertake improvements necessary for adequate service. Staff also reported on letters from customers "who complained of inability to reach either Conlin or his parttime maintenance man."[8] The Commission made factual findings concerning needed service improvements in pump efficiency, system pressure, pipe replacement, and turbidity control. The Commission ordered the company to improve pump efficiency, purchase a turbidity monitor, make available an answering service or machine, and to contract with a licensed civil engineer "to formulate a plan for plant improvement and proper progressive maintenance . . . ."[9]

In approving the rate increase including a surcharge for SDWBA loan repayment, the Commission assured ratepayers, "We are not willing to award these increases without assuring the company's customers that we are prepared to take action if improvements are not made."[10]

B. Resolution W-3445 (1989)

Conlin-Strawberry next came to the Commission in 1988, by way of advice letter, for another rate increase. In a resolution approving the rate increase, the

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[8] *In re* Conlin-Strawberry Water Co., D.83-05-052 at 5, 1983 Cal. PUC LEXIS 916, at *6 (May 18, 1983).

[9] *Id.* at 29, 1983 Cal. PUC LEXIS 916, at *36.

[10] *Id.* at 25, 1983 Cal. PUC LEXIS 916, at *31.

Commission noted continuing problems concerning pump efficiencies and the failure to install a telephone answering machine (although one had been purchased). The Commission noted that a turbidity monitor had been installed. Customers contacted during a staff inspection indicated that low pressure had not been a problem. The Commission made no mention of the previously ordered engineering plan.[11] The Commission did order the company to use only a 2.20% composite depreciation rate until staff had an opportunity to review "a straight-line remaining life depreciation study."[12]

C. Resolution W-3827 (1994)

In 1992, Conlin-Strawberry asked for an additional general rate increase, again by advice letter.[13] In approving the general rate increase, the Commission noted that staff had experienced difficulties in separating the company's expenses from those incurred by Conlin Logging Company, which used the same business office. Many of the speakers at a public hearing criticized service and complained of service interruptions due to power outages. In its discussion, the Commission criticized the company's continuing practice of using a 3.0% composite depreciation rate, contrary to the order set forth in the 1989 resolution. In approving the general rate increase, the Commission did order clear demarcation between expenses incurred by the company and those of the Conlin Logging Company, use of the 2.20% composition depreciation rate, and investigation of back-up power supplies (with authorization to file an advice

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[11] *In re* Conlin-Strawberry Water Co., Res. W-3445 (May 10, 1989).

[12] *Id.* at 7.

[13] *In re* Conlin-Strawberry Water Co., Res. W-3827 (Feb. 16, 1994).

letter for the reasonable costs of installing such capacity). The Commission indicated, "CSWC is placed on notice that continued disregard of Commission orders shall be met with fines or other Commission sanctions."[14]

D. Strawberry Property Owners' Ass'n v. Conlin-Strawberry Water Co. (1995-99)

In 1995, the Association filed a complaint (Case (C.) 95-01-038) with the Commission alleging that the company was being mismanaged and was persistently in violation of orders issued by the Commission and the Department of Health Services (DHS). The Association also complained of alleged irregularities in company finances and requested the appointment of a receiver or another entity to take charge of the company. During the complaint proceeding, the assigned ALJ heard evidence concerning the company's alleged noncompliance with Commission orders issued in 1963; with orders issued in 1983; and citations issued by DHS in 1990, 1993, and 1994. In an interim decision dated September 4, 1996, the Commission concluded that the company had violated 8 specific Commission orders, 17 specific DHS orders, and General Order (GO) 103 (based on the company's violation of DHS directives).[15] While rejecting a receivership, Commission ordered that the company hire "a qualified system operator or manager." The Commission required Conlin to demonstrate why he should not be held in contempt personally for prior violations. The Commission also ordered the Water Division to prepare an audit of the company's books and records and submit the audit report to the Commission

[14] *Id.* at 4.

[15] Strawberry Property Owners' Ass'n v. Conlin-Strawberry Water Co., *supra* note 4.

within 12 months. Both the company and the Association applied for rehearing of this interim decision. While denying rehearing, the Commission modified its earlier decision, principally by determining that because Conlin had not been named in the complaint, he could not be subjected to an order to show cause re contempt. The company was still required to show cause why it should not be held in contempt for violating prior Commission orders.[16]

After the company had an opportunity to demonstrate why it should not be sanctioned for the violations determined in the interim decision, the Commission, on November 18, 1999, imposed a fine of $500 per incident for 20 violations of past Commission and DHS orders—a total sanction of $10,000.[17] In the event the company failed to make the required improvements by April 30, 2000, the Commission also ordered the Commission's General Counsel to "promptly prepare for the Commission's review" a petition seeking the appointment of a receiver to assume possession of the water system.[18]

The company applied for rehearing of this decision in March 1999. Once this was denied, the company filed a petition for review with the California Court of Appeal. The petition for review was denied.[19]

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[16] Strawberry Property Owners' Ass'n v. Conlin-Strawberry Water Co., Inc., D.97-10-032, 1997 Cal. PUC LEXIS 954 (Oct. 9, 1997).

[17] Strawberry Property Owners Ass'n v. Conlin-Strawberry Water Co., Inc., D.99-11-044, 1999 Cal. PUC LEXIS 875 (Nov. 18, 1999).

[18] *Id.* at 23, 1999 Cal. PUC LEXIS 875, at *34.

[19] On April 6, 2000, Conlin-Strawberry petitioned for review by the California Court of Appeal, Fifth District naming the Commission as respondent and the Association as the real party in interest. The petition was summarily dismissed on July 26, 2001. Ex. No. 21: Attachment to OII at 6 (Oct. 16, 2003). Respondents complain that the earlier

Footnote continued on next page

E. Resolution W-4187 (Jan. 20, 2000)

By way of resolution, the Water Division reported on the status of the violations determined in the Association's complaint proceeding. In its January 20, 2000, report, the staff identified six deficiencies that the company had still not cured including improvements to pump efficiencies, plugging of leaks in one tank, the addition of stand-by pumps, and completion of the engineering plan. The Commission reiterated that these deficiencies had to be cured by April 30, 2000, or the General Counsel would prepare a petition for receivership for the Commission's review.

F. Resolution W-4207 (July 20, 2000)

After the April 30, 2000, deadline had passed, the Commission again reviewed a staff compliance report. In Resolution W-4207, the Commission found that the company had cured most of the deficiencies listed in Resolution W-4187 but that serious deficiencies still remained. The Commission extended its April deadline and ordered the correction of eight deficiencies including the hiring of a new system manager and the completion of the engineering report, both to be approved by the Commission.[20]

The company applied for rehearing of this resolution as well. The company argued that the requirement to hire a qualified system operator or manager had been erroneously changed, without hearing, into a requirement to

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Commission proceeding was an "ill-considered decision arising out of a one-sided proceeding . . . ." Respondents' Opening Brief at 6 (Nov. 12, 2004). Such criticism is no more than a collateral attack on a final Commission order that was not overturned by an appellate court.

[20] Resolution W-4207 at 5-6, 2000 Cal. PUC LEXIS 616, at *8-9 (July 20, 2000).

hire both. The Commission rejected this argument. The company also argued that it was deprived of an opportunity to be heard when the Commission indicated in Resolution W-4207 that the Commission might seek a receivership. The Commission modified Resolution W-4207 to require that the company be afforded an opportunity to be heard before filing a petition for a receiver.[21]

G. Informal Complaint Against Water Division

In the meantime, the company had approached Water Division staff in 1999 about the possibility of a general rate increase for the company. Staff did not act upon the request, so the company used the procedure available under the Commission's D.92-03-093[22] to request an ALJ to informally resolve the rate dispute between the company and the staff.[23] An informal hearing was held before an ALJ, whose ruling, issued on August 28, 2000,[24] was generally favorable to the company. The staff did not seek to implement the ruling,[25]

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[21] *In re* Conlin-Strawberry Water Co., D.00-11-043 at 6, 2000 Cal. PUC LEXIS 931, at *7 (Nov. 21, 2000).

[22] *In re* Financial and Operational Risks of Commission Regulated Water Utilities, D.92-08-093, 1992 Cal. PUC LEXIS 237 (Mar. 31, 1992).

[23] *In re* Informal Complaint of Conlin-Strawberry Water Co. v. Commission's Water Division (June 23, 2000).

[24] Ex. No. 506: ALJ Ruling Dealing with Informal General Rate Case Issues, *In re* Conlin-Strawberry Water Co. (Aug. 28, 2000*); see also* Ex No. 86: Staff Report on the ALJ's Ruling Dealing with Informal General Rate Case Issues of the Conlin-Strawberry Water Company (Aug. 2001).

[25] *See* Part X, *infra*, for additional discussion of the Water Division's actions following the ALJ Ruling.

however, and, for its part, the company never filed a formal ratesetting application after staff inaction.

H. Issuance of the OII

In 2001, the Association prepared the draft of a second complaint against the company. Although this complaint is in evidence in this proceeding, it was never formally filed with the Commission.[26]

On October 16, 2003, the Commission finally issued its OII commencing this proceeding.[27] The OII attached the Water Division report. The Commission named Danny T. Conlin and Conlin-Strawberry Water Company Inc., as respondents. The OII categorized the proceeding as adjudicatory.

IV. OII Allegations

A. Principal Allegations

The OII sets forth a mixed set of factual and legal allegations that are based on two Water Division reports appended to the OII. The scoping memo, however, organized these various allegations into two main categories: (1) alleged violations of Section 855; and (2) violations of other legal requirements. After the evidentiary hearing and briefing, it is apparent that most of the allegations are subsumed under one or more of the three subparts of Section 855:

1. The utility's inability or unwillingness to serve ratepayers;

[26] Ex. No. 4: Strawberry Property Owners' Ass'n v. Conlin-Strawberry Water Co., Draft Complaint (signed May 17, 2001).

[27] Ex. No. 21: Investigation on the Commission's Own Motion into the Operations & Practices of Conlin-Strawberry Water Co. (U-177-W) & Owner/Operator, Danny T. Conlin, I.03-10-038 (filed Oct. 16, 2003) (OII).

2. Actual or effective abandonment; and

3. Unresponsiveness to the Commission's orders or rules.

I have organized my discussion of the allegations and proof according to these three subparts. Violations of Section 855, if proven, may also constitute other violations of law. Where I have found other violations of law, I have so indicated.

B. Defenses/Mitigation

Respondents indicated they would offer certain defenses and mitigation to the violations claimed by the Water Division, and these were included within the scope of the proceeding:

1. Do the allegations in the staff report, set forth in Exhibits 1 and 2 to the OII, reflect current conditions?

2. To what extent is the financial condition of Conlin-Strawberry due to the failure to receive timely rate relief from the Commission?

C. Remedies

The parties also sought to litigate the appropriate remedies in the event I found violations of statute or Commission rules or orders. These are the remedy issues upon which they sought to be heard:

1. Have the respondents, after notice and hearing, shown cause why the Commission should not petition the Tuolumne County Superior Court for appointment of a receiver to assume possession and operation of Conlin-Strawberry and its water system?

2. Legislative intent

a. Did the California Legislature, in enacting Public Utilities Code Section 855, intend that a receiver be appointed under the facts before the Commission in this manner?

b. Does the action proposed in the OII, the appointment of a receiver, comport with the legislative history of enacting Public Utilities Code Section 855?

3. Does the action proposed in the OII, the appointment of a receiver, comport with past Commission precedent?

4. How will ratepayers be affected financially if a receiver is appointed?

5. If sustained at hearing, do any of the violations alleged in the OII, or Exhibit 1 or 2 thereto, warrant fines, penalties, or other remedies?

One problem was the relevant time period for this investigation. Some of the allegations and prepared testimony referred to events that are many years old. Many of the alleged events preceded earlier Commission proceedings. I ruled that evidence could be offered as follows: (1) reports of Commission-ordered investigations, not previously completed (this included the financial audit mandated by D.96-09-043); (2) evidence of non-compliance with previous Commission orders; and (3) evidence concerning incidents occurring after September 4, 1996 that tends to support the allegations contained in the OII. September 4, 1996, is the date of the Commission's interim decision on the complaint brought by the Association. I deemed pre-September 1996 conduct to have been addressed in that proceeding unless the evidence demonstrated that respondents were no longer in compliance with the Commission's orders in the Association's complaint proceeding (C.95-01-038).

Another problem was presented by respondents' failure to respond to certain of my discovery orders during the proceeding. Based on a motion for

sanctions brought by the Water Division, I imposed certain sanctions that limit respondents' ability to contest some of the above-stated issues. Respondents have asked me to reconsider my ruling. I discuss their request in Part VI(C) of this decision.

V. Burden of Proof

The OII instructs the respondents to show cause why the Commission should not petition the superior court for the appointment of a receiver. They are also directed to show cause why fines, penalties, and other remedies should not be imposed. In a recent OII concerning another water utility, the Commission used similar language to place the burden of proof on the respondent "'to show good cause why the proposed legal action should not go forward.'"[28]

I conclude, however, that placing the burden of proof on the respondents in this proceeding, where substantial property rights are at issue, violates California constitutional law. The California Supreme Court, in a license revocation situation, has held:

> When an administrative agency initiates an action to suspend or revoke a license, the burden of proving the facts necessary to support the action rests with the agency making the allegation. Until the agency has met its burden of going forward with the evidence necessary to sustain a finding, the licensee has no duty to rebut the allegations or otherwise respond.[29]

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[28] *In re* Ponderosa Sky Ranch Water Co., D.02-09-004, 2002 Cal. PUC LEXIS 525 (Sept. 5, 2002), *citing* original OII in proceeding.

[29] Daniels v. Department of Motor Vehicles, 33 Cal. 3d 532 (1983). *See also Administrative Law*, 2 CAL. JUR. 3D § 526 (Rev. 1999), and cases cited therein: "As in court proceedings, the burden of proof, including both the initial burden of going forward

Footnote continued on next page

The Water Division has the burden of going forward with the evidence and must prove the allegations set forth in the OII by the preponderance of the evidence.[30] As discussed later, the Water Division has met its burden as to many of the allegations.

VI. Violations of Commission's Discovery Orders

During the proceedings, the Water Division filed two motions for sanctions against Conlin-Strawberry and Conlin, as its owner and operator. By a ruling after the evidentiary hearing, I decided both motions and found that respondents had violated certain Commission orders by failing to respond to discovery rulings in the proceeding.[31] I imposed certain issue and evidentiary sanctions as provided by California Code of Civil Procedure Section 2023(b)(2) & (3) and often used by the Commission.[32]

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and the burden of persuasion by a preponderance of the evidence, is on the party asserting the affirmative of an issue before an administrative agency." In this proceeding, the Water Division is asserting the affirmative, *i.e.*, that violations have occurred, a receiver should be appointed, and other sanctions should be imposed.

[30] *See, e.g., In re* Telesystems International, D.97-05-089, 1997 Cal. PUC LEXIS 447, at *35 (May 21, 1997) ("It is well settled that the standard of proof in Commission investigation proceedings is by a preponderance of the evidence.").

[31] ALJ's Ruling on Water Division's Motion for Sanctions (Oct. 26, 2004).

[32] *See, e.g., In re* AT&T Communications of California, Inc., D.02-05-042, 2002 Cal. PUC LEXIS 286 (2002); *In re* Pacific Enterprises, D.98-03-073, 1998 Cal. PUC LEXIS 1, at * 219 (1998).

Respondents moved for reconsideration of my ruling,[33] and I reserved my decision on the motion for reconsideration, as well as any additional monetary sanctions, until this Presiding Officer's decision.

A. First Water Division Motion

The first motion (May 18, 2004) sought sanctions for respondents' alleged failure to comply with the assigned ALJ's ruling of May 7, 2004, requiring the disclosure of certain employee information, tax returns, and Conlin's whereabouts during 2001-03. This motion was heard on September 2, 2004.

Information about Conlin's whereabouts could reasonably have led to admissible evidence as to whether Conlin was impermissibly involved in utility operations (in contravention of prior Commission orders) or had effectively abandoned the utility. Conlin failed to provide even a basic chronology of his general whereabouts during the years in question. I adopted an evidentiary and issue sanction specifying as follows: "In violation of Public Utilities Code § 855, owner Respondent Danny Conlin has actually or effectively abandoned the Conlin-Strawberry Water Co. Respondent Danny Conlin is hereby precluded from offering any evidence, relying on any evidence already admitted into evidence, or advancing any argument contrary to this determination."[34]

The Water Division also sought sanctions for respondents' failure to provide copies of corporate state and federal tax returns for the years 1984-2003. For this period, federal tax returns were provided only for five years (1997, 1998,

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[33] Conlin-Strawberry Water Co., Motion for Reconsideration of Order Imposing Sanctions (Nov. 12, 2004). The Water Division responded on November 19, 2004.

[34] ALJ's Ruling, *supra* note 31, at 8.

1999, 2001, and 2002) and a state tax return was provided for only one year (1997). Respondents maintained that tax returns only have to be retained for seven years.

I determined that the company's document retention responsibilities included these tax returns. While tax returns are not specifically mentioned in GO 28, "[a]ll records pertaining to original cost of property and . . . depreciation and replacement of equipment and plant" must be retained; and a utility could not comply with this requirement without retaining tax returns showing this information. Additionally, utility tax returns are a foundational business financial record and fall well within the types of documents that GO 28 requires to be retained. Resolution A-4691 requires that these tax records be retained for seven years "after settlement," and I concluded that seven years from filing of a return is the appropriate retention period for respondents' corporate income tax returns due to the basic importance of these documents.

I found that respondents had violated Section 791 and GO 28 by failing to maintain and make readily available to the Commission the federal corporate income tax return for 2000 and the state corporate income tax returns for 1998-2002. The Water Division asked for a variety of evidence, issue, and monetary sanctions. I sanctioned respondents by imposing the following evidentiary and issue sanction: "Audit Issue D(3) [denying staff access to utility books and records], as set forth in the Order Instituting Investigation at page 9, is conclusively determined to have been established. Respondents have violated state law (Public Utilities Code Section 791) and prior orders of the Commission

(GO 28). Any evidence or argument of Respondents to the contrary will be disregarded."[35]

B. Second Water Division Motion

The second motion sought sanctions for respondents' alleged failure to provide certain data from bookkeeping accounts and customer information. This second motion was orally made and heard also during the September 2, 2004, hearing and later presented in a written motion filed on September 16, 2004. The Water Division sought monetary and issue sanctions to preclude respondents from contesting certain issues framed in this proceeding. Respondents responded to both motions.

First, the Water Division alleges that respondents failed to produce supporting papers for certain bookkeeping accounts for the period of January 1, 1999, through December 31, 2003. The accounts track employee labor, transportation expenses, office services and rental, and general expenses. Respondents conceded that no work papers had been provided because no such work papers exist.

Sections 791 and 792 authorize the Commission to establish and require a system of accounts for utilities. GO 28 requires utilities to keep information concerning the corporate accounts. Resolution A-4691 establishes retention periods for various general accounting records that range from 3 to 50 years. Trial balances are to be retained for three years. Purchase and supply records are to be kept for six years and revenue records generally for ten years. The type of supporting documents that the Water Division sought certainly should be

[35] *Id.* at 4.

retained for at least three years, which for this proceeding means from October 2000 (three years before the issuance of the OII). That respondents were unwilling or unable to provide work papers or other documents supporting these account entries indicated a substantial noncompliance with Section 791 and GO 28.

I sanctioned respondents by imposing the following issue sanction: "Audit Issues D(3) & (4) [denying staff access to utility books and records; improper accounting methods], as set forth in the Order Instituting Investigation at page 9, are conclusively determined to have been established. Respondents have violated state law (Public Utilities Code Section 791) and prior orders of the Commission (GO 28)."[36]

After imposing these evidentiary and issue sanctions, I reserved for the present decision the question of whether monetary sanctions should also be imposed for these discovery violations. I discuss the propriety of monetary sanctions along with the discussion of remedies later in this decision.

C. Respondents' Motion for Reconsideration

In their motion for reconsideration, respondents indicate that I erred in the imposition of sanctions by ruling both that certain facts are deemed established and that the so-established facts also constitute violations of law (*e.g.*, abandonment within the meaning of Section 855).[37]

I disagree with respondents' narrow reading of Code of Civil Procedure Section 2023(b)(2). The authority of that provision, to prohibit a party from

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[36] *Id.* at 6.

[37] Motion for Reconsideration, *supra* note 33, at 4.

opposing a "designated claim," leads to a virtual concession of that claim. In any event, my evidentiary and issue preclusions are collaborated by other evidence indicating Conlin's absence from the company, respondents' failure to use proper accounting methods, and respondents' failure to provide staff with access to utility books and records. Respondents' motion for reconsideration is denied.

D. Request for Additional Issue Sanctions

The Water Division now asks for additional issue sanctions for respondents' alleged failure to respond to a May 7, 2004, ruling. The ruling required respondents to provide certain information concerning past and current employees. In response, respondents provided spotty information, but not enough information to satisfy the Water Division. Subsequently, the Water Division sought sanctions for the company's alleged failure to comply with the May ruling. On October 26, 2004, I denied the Water Division's request for sanctions because I believed the respondents (though certainly not adept in record-keeping) had not intentionally withheld the requested information. In its request contained in its brief, the Water Division has offered nothing new to convince me otherwise. The Water Division's request for additional issue sanctions is denied.

VII. Discussion of Principal Allegations

Most of the Water Division's allegations assert violations of Section 855. As previously mentioned, Section 855 authorizes the Commission to petition for a receiver if a water company "is unable or unwilling to adequately serve its ratepayers[,] or has been actually or effectively abandoned by its owners, or is unresponsive to the rules and orders of the commission, ..." The following discusses the evidence material to the three subparts of Section 855. I have also

indicated where I believe that respondents' conduct also violates other laws or Commission orders.

A. Is the Utility Unable or Unwilling to Adequately Serve Ratepayers?

The OII alleged, by way of example of this type of violation, that the respondents had disregarded a Commission order to install an answering machine or provide an answering service for ratepayers. In its case at hearing, the Water Division also offered evidence of tank leakages, low water pressure, and failure to install a turbidity monitor as other violations of this "unable or unwillingness" prong of Section 855.

1. Answering Machine

The Commission first ordered Conlin-Strawberry to arrange for an answering service or install an answering machine in 1983. One would think that this requirement would be one of the simplest and inexpensive for the company to fulfill. Unfortunately, the answering machine (or lack thereof) has become symptomatic of the many management difficulties facing the company. A utility that is unable to provide a reliable means to contact the company, whether through an employee, answering service, or functioning answering machine, is likely unable to manage the more difficult tasks involved in running a water system.

In its 1983 decision, the Commission noted that 18 customers had complained of their inability to reach Conlin or the maintenance man.[38] Accordingly, the Commission ordered the use of a telephone answering service

[38] D.83-05-052, *supra* note 8, at 5, 1983 Cal. PUC LEXIS 916, at *6.

or machine within 30 days of the decision. The Commission determined, in 1999, that the company had not complied.[39] Finally, in its January 2000 resolution, the Commission found the company to be in compliance.[40]

Like the tank repair requirement I discussed earlier (and contrary to respondents' arguments), I consider the answering machine/service requirement to be an ongoing company obligation. Unfortunately, during a power outage in December 2002, customers were unable to reach a company representative for several days. Also, when other customers have left messages on the company's answering machine, their calls have not been returned.[41]

When providing such an important commodity as water, a utility has a public service obligation to provide a reliable method for contacting company personnel concerning problems affecting the delivery and quality of the water. General Order 103 requires that, upon a customer's complaint, "the utility shall promptly make a suitable investigation and advise the complainant of the results thereof."[42] Conlin-Strawberry has violated GO 103 and the Commission's 1983 decision by failing to provide a reliable telephone answering system and, further, by failing to respond to customer complaints and inquiries in a prompt manner.

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[39] D.99-11-044, *supra* note 17, at 20, 1999 Cal. PUC LEXIS 875, at *30.

[40] Res. W-4187 (Jan. 20, 2000).

[41] Ex. No. 96: Deposition of Evelyn C. Olson at DT 43:16-44:4 (April 16, 2004) & Declaration at 4-5 (April 9, 2004) (exhibit to deposition).

[42] GO 103, Rules for Governing Water Service Including Minimum Standards for Design and Construction at tit. I(8) (1956 as amended).

2. Tank Leakages

In the Commission's interim decision in September 1996, the Commission ordered Conlin-Strawberry to repair leaks in the Lower Dymond storage tank. The Water Division's July 2000 verification report, ratified by the Commission in Resolution W-4207, reported that the leaks had been repaired. However, I interpret the Commission's 1996 order to impose a continuing reasonable obligation on the company to ensure that post-1996 leaks are also sealed.

Photographs admitted during the hearing provide striking evidence that the Lower Dymond tank continues to leak as of May 2004.[43] What is worse is that many of the holes are imperfectly plugged with branches and twigs, likely introducing foreign substances into a treated water supply.[44] The photos demonstrate the casual and unprofessional attention being given by Conlin-Strawberry management to asset maintenance and the health of its customers.

3. Low Water Pressure

While the Commission found in 1996 that the company had failed to achieve the required pump efficiency, the Water Division concedes that this condition was satisfied in July 20, 2000. Some of the witnesses at the hearing testified to low water pressure, but this problem seemed to be related to the

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[43] Ex. Nos. 71-74: Series of Photographs.

[44] GO 103, *supra* note 42, at tit. IV(2), requires that "[a]ll new mains, pumps, tanks, wells and other facilities for handling potable water and insofar as practicable, repaired mains and other facilities, shall be thoroughly disinfected before being connected to the system." While there is no evidence on how the twigs were placed in the tank, I have serious misgivings that the twigs and branches were disinfected before they were thrust into the side of the tank.

combination of high-elevation water users and low river water conditions. The evidence of low water pressure is insufficient to support a finding that Section 855 has been violated.

4. Turbidity Monitor

The Water Division argues that Conlin-Strawberry's belated installation of a turbidity monitor is an additional violation of a Commission order. The company was ordered to install a turbidity monitor in 1983. In its 1996 interim order, the Commission found, as a matter of law, that Conlin-Strawberry had violated the 1983 order by failing to install the monitor. In its final opinion in 1999,[45] the Commission determined that the company had belatedly complied by purchasing a monitor and that any sanction was barred by the statute of limitations. With no other evidence concerning the present status of the monitor, I recognize that the Commission has previously determined that no sanction can be imposed on Conlin-Strawberry for failing to promptly purchase the monitor as originally ordered in 1983.

B. Have Respondents Actually or Effectively Abandoned the Water System?

The Water Division has argued that Conlin's physical absence from the water system constitutes actual abandonment. Also, I have issued an evidentiary and issue sanction that results in the conclusive determination that Conlin did indeed actually or effectively abandon the system.

Conlin argues that the Commission itself brought this condition on by ordering active water system management to be transferred to a qualified

[45] D.99-11-044, *supra* note 17, at 19-20, 1999 Cal. PUC LEXIS 875, at *29.

operator or manager (discussed further in Part VII(C)(2), *infra*). The Commission never ordered Conlin to abdicate all responsibilities for the system. His failure during summer 2004 to ensure the most-recent operator's continuity or replacement indicates such effective abandonment.

The Water Division also alleged that excessive management salaries to Conlin, failure to deposit surcharge collections, and improper use of loan proceeds are additional indications of abandonment (all discussed *infra*). I agree that Conlin's receipt of excessive management salaries is also evidence of effective abandonment, since it depletes the utility of financial resources. The loan repayment surcharges, however, were payments ratepayers did not need to make in order for the company to meet its loan obligations. The excessive surcharges did not cause direct harm to the utility and do not constitute abandonment. Finally, I do not believe the Water Division has carried its burden of proving improper use of the loan proceeds.

C. Have Respondents Been Unresponsive to the Rules and Orders of the Commission?

The OII frames this issue: "Are respondents unresponsive to the rules or orders of the Commission when they failed to timely comply by September 30, 2000, or any time thereafter with all Commission orders as directed by Resolution W-4207?" This question frames issues concerning the engineering plan, system operator, and tank leaks. I also believe that all of the financial issues can be addressed under this issue as well although they may constitute other violations of statute or Commission orders.

1. Preparation of Engineering Plan

The Water Division sought to prove respondents' noncompliance with the Commission's 1983 order to prepare a plant improvement and progressive maintenance plan. The Commission's precise order was as follows:

> The Company shall, within 30 days of the date of this order, contract with a licensed civil engineer to formulate a plan for plant improvement and proper progressive maintenance, as set forth in Finding 7. A copy of the engineering report shall be furnished to this Commission, Attention Hydraulic Branch, and to the Department of Health Services (DHS).[46]

In April 2000, respondents submitted a letter authored by R.F. Walter, a consulting engineer, to the Water Division in an effort to satisfy this requirement.[47] On July 20, 2000, the Commission approved a "verification resolution" prepared by the Water Division summarizing the company's compliance with prior Commission orders.[48] The Commission determined that the company had not satisfactorily completed the engineering report, described the Walter letter as a "laundry list—not an engineering report," and ordered the company to correct all deficiencies.

In their brief, respondents argue that the original Commission order was imprecise in its requirements. They also argue that when the Water Division rejected the Walter letter in 2000, staff was using criteria set forth in GO 103 and DHS Guidelines that were never part of the original order.

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[46] D.83-05-052, *supra* note 6, at 29, 1983 Cal. PUC LEXIS 916, at *36.

[47] Ex, No. 28: Letter from R.F. Walter, Frank Walter and Associates, to Danny Conlin (April 26, 2000).

[48] Resolution W-4207, *supra* note 20.

Respondents ignore the most significant fact that 17 years had passed before they made a serious effort to satisfy the engineering report requirement set forth in the Commission's 1983 decision. The three-page letter authored by Walter does discuss maintenance and capital improvement needs, but in the most cursory way. The letter does not constitute a plan in the commonly understood sense of prioritizing needs, estimating costs, and establishing a timetable. At most, the letter is a preliminary assessment of the types of improvements that should be considered.

William Rugg, President of the Association, is also the retired community development director for the City of San Leandro. In that capacity, he was the department head for five city government divisions: engineering, traffic engineering, planning, redevelopment, and building inspection. With this background, Rugg was qualified to provide an expert opinion on the general requirements of an engineering plan, which he described as including (a) an existing "as-built" plan; (b) a long-range projection of useful life; (c) a plan for gradually replacing or restoring elements of the facility to avoid a disaster; (d) a preventive maintenance plan; and (e) an emergency response plan.[49] Of these components, the Walter letter only makes the most general comments about asset replacement and maintenance. It does not qualify as an engineering plan.

On this point, however, my evaluation of the plan or report is unnecessary. The Commission itself, in Resolution W-4207, determined the letter to be unsatisfactory as a plan and ordered compliance by September 30, 2000. In the absence of any other evidence indicating that Conlin-Strawberry cured or sought

[49] RT at 142:19-144:28 (May 11, 2004).

to cure this deficiency, the Commission's determination on this issue is conclusive. Conlin-Strawberry is in substantial violation of the Commission's 1983 order concerning the preparation of an engineering report.

2. Failure to Replace System Manager

As one outcome of the Association's complaint, the Commission ordered in 1996 that Conlin-Strawberry "should replace its current system manager [Danny Conlin] with one who is qualified and willing to comply with past Commission and DHS orders. Commission Staff should approve the selected system manager and/or operator."[50] The Commission later reaffirmed this requirement, stating, "We did not err in ordering Conlin-Strawberry to replace a manager we lack confidence in with a qualified manager or operator."[51]

In April 1997, Conlin-Strawberry was successful in hiring Jim Pingree as the full-time operator for the system. Danny Conlin became less involved, spending substantial amounts of time in Southern California. Pingree was qualified to operate the system since he holds the requisite operating and treatment certificates issued by DHS. Some evidence indicates that system operation improved when Pingree was frequently present. At the evidentiary hearing, however, both Pingree's and Conlin's testimony indicated that responsibility for daily operations had deteriorated into a haphazard arrangement. Pingree indicated that, since May 2004, he had gone to work full-time for the Tuolumne Development Authority. While he was attempting to

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[50] Conclusion of Law 4, D.96-09-043, *supra* note 4, 1996 Cal. PUC LEXIS 910, at 42.

[51] D. 97-10-032, *supra* note 16, at 9-10, 1997 Cal. PUC LEXIS 954 at *15.

work on the Conlin-Strawberry system three times per week, he indicated that his status with the company was uncertain. While other persons, such as Andy Cranston, were more immediately available, they are not certified to make adjustments in water treatment. Conlin testified that Cranston was making water readings and Pingree was making water treatment adjustments every other day. Conlin also indicated that it was difficult to hire a certified system operator and that a full-time position commands $40,000 to $50,000 per year (Pingree was hired in 1997 for $24,000 per year full-time).

The Water Division and respondents disagree over whether Conlin-Strawberry has satisfied the Commission's orders concerning the hiring of a system manager or operator, and they have parsed the meaning of these words. The Water Division argues that Conlin has compounded the problem by continuing to draw a management salary, but Conlin indicates the salary is only a draw of earnings (to be addressed later). Respondents also say the evidence does not support the requirement of a full-time manager.

This statement misses the point. What is important from the Commission's perspective is that the Conlin-Strawberry system, from May to at least September 2004, did not have in place a reliable, routine method of water quality and supply management by qualified and properly certified individuals. To his credit, Pingree was attempting to continue work on the Conlin-Strawberry system, but these efforts were in addition to his full-time work elsewhere. Communications between Conlin and Pingree during this critical period appeared to be infrequent. In its January 22, 2004, letter to Conlin, DHS indicated that when Pingree is unavailable, the only other certified operator available to manage all aspects of the treatment plant is Conlin. Yet, according to

DHS, "you [Conlin] are absent over extended periods due to your commercial logging business."[52]

Nothing in this haphazard management arrangement provides water users or the Commission with any assurance that even minor system repairs or water quality problems, much less major breakdowns or severe water quality problems, will be promptly and professionally remedied.

3. Management Salaries

One of the allegations contained in the OII was that Conlin had received unauthorized and excessive management salaries from the company. In his Supplement to OII 2003 Audit Report,[53] Water Division expert witness Herbert Chow reports Commission-authorized management salaries from 1983 through 2002. Management salaries were initially authorized at $2,960 per year by the Commission's 1983 decision, increased to $3,630 per year by a Commission resolution in 1989, and increased again to $12,430 per year by a Commission resolution in 1994. Over this 19-year period, Conlin was authorized to receive management salaries in the amount of $143,863. According to annual reports filed with the Commission, however, Conlin-Strawberry reported the payment of $305,878 in management salaries. According to corporate cash disbursement records for the same period, Conlin-Strawberry reported a somewhat different total of $289,000 in management salary payments.

Based on these figures, Chow estimates that the company paid out between $145,837 (based on cash disbursements) and $162,015 (based on annual

[52] Ex. No. 112: Letter from DHS to Danny Conlin (June 9, 2004).

[53] Ex. No. 116: H. Chow, Supplement to OII 2003 Audit Report (2004).

report information) in unauthorized management salaries for the 19-year period. If cash disbursement figures are used, the company shows a cumulative net loss of $154,841 for the period. If the excessive salaries had been left in the company, Conlin-Strawberry would have shown a modest cumulative net loss of $9,004 for the 19-year period (with individual years varying from almost $18,000 net loss (1987) to almost $16,000 net gain (1984)).

Respondents' position is two-fold. First, because the Commission engages in traditional ratemaking for water utilities, its adoption of test years as part of a rate decision does not prevent the company from spending more or less in an operating expense account. All the company is required to do is to charge the authorized rates. Second, respondents argue that Danny Conlin took his authorized rate of return out of the company through salary payments rather than as dividend payments.

Respondents' second argument points out a significant weakness in the Water Division's theory of the case. Chow could identify no specific expenditures (other than through the payment of management salaries) indicating that Conlin was receiving dividend payments or other returns on his capital contributions to the company. Respondents calculate that, since 1983, the Commission's rate-of-return decisions and resolutions through 2003 have authorized the recovery of approximately $283,000. This is close to the sum of $293,875 that Chow estimates was paid to Conlin in management salaries during those years.

The Water Division has failed to make its case that Conlin engaged in wholesale looting of the company through excessive management salaries. Indeed, in its annual reports, Conlin-Strawberry was reporting to the Water

Division, in a reasonably accurate fashion, the actual salary being paid to Conlin.[54]

The evidence does demonstrate that Conlin-Strawberry disregarded the corporate form and failed to adhere to Commission's accounting orders. Respondents suggest that the Water Division "has ignored Mr. Conlin's right to earn the 'fair rate of return' to which the [California] Supreme Court makes reference in" *California Manufacturers Association* v. *Public Utilities Commission*.[55] As a separate corporate entity, however, it is Conlin-Strawberry's right to earn a fair rate of return—not Conlin. In such legal arguments, as in their business practices, respondents impermissibly ignore the distinction between the company as a corporation and the sole shareholder.

Effective January 1, 1985, the Commission adopted a Uniform System of Account for Class B, C, and D water utilities including Conlin-Strawberry. The Uniform System of Accounts requires that management salaries, which are "chargeable to utility operations," be posted to Account No. 671. Dividends, however, are to be charged to Account 215, "Retained Earnings." But since 1983, Conlin-Strawberry was consistently showing negative retained earnings that ultimately totaled $80,000 in 2002. The company had no retained earnings from which to draw dividend payments to its sole shareholder, Conlin. By admittedly taking larger salaries than set forth in test years reviewed by the Commission, however, Conlin was in many years receiving a preference over competing operating expenses. In some years, when the company had positive net income,

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[54] *Id.* at AD000001.

[55] 24 Cal. 3d 251 (1979).

even after Conlin's excess salary is factored back in, the salary payment may not have had any detrimental effect. In other years, such as 1989, Conlin's salary preference diminished the amount of money available for other operating expenses. In Resolution W-3445, the Commission approved rates for test year 1989 funding an estimated $42,754 in operating expenses (before depreciation and taxes), including $3,630 in management salaries, and a rate of return of 10.5%.[56] Conlin-Strawberry's annual report for 1989 shows actual operating expenditures of $59,533 and a net loss of $16,895.[57] No dividends could have been paid from earnings this year but Conlin was paid a management salary of $12,100. Regulatory expenses were also $5,000 more than estimated in W-3445. Only $346 was spent on materials, which is miniscule on a capital-intensive water system. Under such an arrangement, Conlin's excess salary payments directly competed with other necessary operating expenses, setting up circumstances for the decline of the water system.

Conlin-Strawberry has failed to account for operating expenses, retained earnings, and dividends in the manner ordered by the Commission in the Uniform System of Accounts. While respondents argue that utilities are free to expend whatever is necessary, so long as approved rates are honored, this is an over-simplification of ratesetting for two reasons. First, Commission staff process rate applications and advice letters using Standard Practice U-3-SM.[58]

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[56] Ex No. 116: *supra* note 53, at JD000081.

[57] *Id.* at AD000030.

[58] Ex. No. 84: Standard Practice for Preparing Results of Operation Reports for General Rate Increase Requests of Water Utilities Other than Major Companies, Standard Practice U-3-SM (rev. Sept. 2001).

The Standard Practice requires staff to carefully review major items, including how management salaries are estimated. This review forms the basis of the summary of earnings set forth in the Commission-approved decision or resolution. These estimates form an implicit but material element of the Commission's approval of rates. While actual revenues and expenditures may vary, the burden is on the utility to explain significant departures.

Second, the only explanation advanced by respondents for management salaries, consistently in excess of those set forth in the summary of earnings included in Commission decisions and resolutions, is that these payments were a means for Conlin to recover the authorized rate of return. This explanation admits that the payments were not properly chargeable to utility operations.

These management salary expenditures are significant deviations from the proposed expenditures set forth in summaries of earnings included in the Commission's rate decisions and resolutions for Conlin-Strawberry. Given this pattern of significant deviations, the burden is on the utility to provide a reasonable explanation. Respondents have failed to provide an acceptable explanation and, indeed, have admitted that such payments were a means for Conlin to obtain an authorized rate of return. This practice, because it allowed Conlin to convert the authorized rate of return into a guaranteed return to himself regardless of the impact on the company, violates the Uniform System of Accounts, has afforded a shareholder an unauthorized preference over other approved operating expenses, and violates the prior decisions and resolutions setting rates for this utility.

4. Surcharges

The OII alleges that respondents failed to deposit surcharges into the SDWBA Trust Account for repayment of the SDWBA loans. In its 1983 decision

authorizing Conlin-Strawberry to apply for a SDWBA loan, the Commission required:

> To assure repayment of the loan, company shall deposit all rate surcharges and upfront cash payment revenue collected with the fiscal agent approved by the Department of Water Resources. Such deposits shall be made within 30 days after the surcharge and up-front cash payment moneys are collected from customers.[59]

In his prepared testimony, Chow calculates that from April 1984 through December 2003, Conlin-Strawberry over-collected loan repayment charges by $64,842. His calculations are based on a methodological comparison of surcharge collections as reported by the company's cash journal and bank deposits with the fiscal agent. Chow further calculates the interest on these over-collections as $41,716.[60]

Respondents counter that the significance of these allegations is "overstated" since the necessary loan payments have been timely made over the years and, in any event, the amount of over-collection was only 7.45% of total collections or 77 cents per customer per month. Such is the novel justification for a skimming operation that has lasted 20 years and, with interest, totals almost $107,000.

Certainly, ratepayers lost the use of money that was not actually needed for loan repayment. How these surcharge over-collections affected overall company finances, however, is hard to decipher. Some of the money may have

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[59] Ordering Paragraph 10, D.83-05-052, *supra* note 6, at 30, 1983 Cal. PUC LEXIS 916, at *37.

[60] Ex. 116, *supra* note 53, at JD000055 to JD000060.

been used for water system operations. Some of the money, as the Water Division argues, may have made its way into Conlin's pockets through excess management salaries. I do not need to unravel these financial mysteries. In its 1983 decision, the Commission authorized Conlin-Strawberry to borrow money and to impose a surcharge for loan repayment. The Commission imposed the specific obligation upon Conlin-Strawberry to apply all collections to the repayment of the loan.

Conlin-Strawberry's practice of collecting these surcharges violates Sections 532 and 734. The practice violates Section 532 because Conlin-Strawberry received different compensation than specified in its schedules on file and in effect at the time. All the company's tariffs since the Commission approved the surcharge in 1983 carried the provision, "The surcharge is in addition to the regular metered water bill. The surcharge must be identified on each bill. The surcharge is specifically for the repayment of the California Safe Drinking Water Bond Act loan authorized by Decision 83-05-052." The company, however, was collecting and using portions of the surcharge for purposes other than repayment of the loan. Under these circumstances, Conlin-Strawberry also violates Section 734 since, by engaging in a practice prohibited by Section 532, the company was charging unreasonable and excessive rates.

5. Misappropriation of Loan Proceeds

The Water Division has alleged that the respondents misappropriated SDWBA loan monies for personal or other unauthorized purposes other than system improvements. If proven, the Water Division believes these allegations would constitute abandonment, as well as violations of other statutes or Commission orders.

The Commission authorized respondents to borrow a total of $411,200 from the DWR in 1983 to satisfy DHS's requirements.[61] The described scope of work included a filtration system ($96,000), supply line and distribution line replacement ($165,700), and a new tank ($58,000). An 8% contingency amount, engineering and overhead charges, and DWR's 3% fee added another $91,500 to the estimated and approved expenditures.[62] In 1986, the Commission approved an additional loan of $51,500 because pipeline installation in rocky ground exceeded original estimates.[63]

There is no indication that DHS, DWR, or even the Water Division dispute that these water system improvements were made in substantially the manner proposed in 1983. There is no evidence before me that DWR has questioned the use of the loan proceeds over the years. Yet, in its case, the Water Division maintains that $224,612 of the SDWBA loan proceeds are "unsubstantiated" and "misappropriated."[64]

Chow used a multi-step methodology to reach this conclusion. He starts with the 16 DWR loan reimbursement checks, totally $448,337, issued by DWR in response to 16 billings submitted by Danny Conlin Excavating. These checks were deposited in a "loan disbursement account" maintained by Conlin-Strawberry at a local bank. Chow then traces the 77 checks drawn on the "loan disbursement account" and finds that payments (other than bank charges)

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[61] D.83-05-052, *supra* note 6, 1983 Cal. PUC LEXIS 916.

[62] *Id.* at 19-20, 1983 Cal. PUC LEXIS 916, at *23.

[63] D.86-11-004, *supra* note 7, at 2, 1986 Cal. PUC LEXIS 670, at *1.

[64] Ex. No. 116, *supra* note 53, at 9-10.

were made to three sets of recipients: (a) Danny Conlin ($59,177); (b) Conlin-Strawberry ($269,608); and (c) outside contractors ($119,251). The vast majority of these disbursements were made in 1984-87.

At this point, Chow makes several unwarranted assumptions. With reference to the $59,177 paid to Conlin, Chow concludes that the total amount is unsubstantiated because Conlin has "failed to specify and document the SDWBA costs or work claimed for this amount."[65] Of the $269,608 loan proceeds paid to Conlin-Strawberry, Chow concludes that $104,174 paid by the company to third-party contractors was "substantiated" but the remaining $224,612 is "unsubstantiated." For some reason, Chow again includes in this total the $59,177 disbursed directly from the loan disbursement account (not from the company) to Conlin.

Respondents are correct in their arguments that Chow has recognized as "substantiated" only payments from the loan disbursement account to outside contractors or payments from the company to outside contractors and suppliers. Chow effectively considers any labor provided by Conlin, his employees, or employees of the company to be "unsubstantiated" expenditures.

Chow's prepared testimony, however, contains a table of billing claims for Conlin Excavating Company workers for the years 1984-87. The table includes the names for at least 35 individuals (only first names for many) who, according to respondents' records, performed work during those years. The wages total $113,198. The table is accompanied by 17 pay slips indicating the payment of wages by Conlin-Strawberry or Conlin during 1984-86. Chow, however,

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[65] *Id.* at 9.

considered these records to be unsatisfactory since they were not collaborated by "tax withholding, Social Security tax. Also the SDI, all these taxes to provide whether such a person existed. We don't have anything."[66]

I acknowledge that respondents' record-keeping practices are substandard, but a principal reason "we don't have anything" is because Chow was attempting to audit transactions that occurred 17 to 20 years ago. I would expect that many of the construction-related records would be destroyed or lost in the normal course of business over so many years. Respondents have no legal obligation to maintain tax records beyond seven years of filing (tax records concerning construction completed in 1987 would be retained until 1994). The Commission did authorize an audit in 1996 and mandated that it be filed within 12 months. Had the audit been completed at that time, the Commission would have been in a better position, as early as 1997, to determine whether loan proceeds had been properly used. If respondents resisted the audit, the Commission could have dealt with any obstruction forcefully at that time.

The Water Division has alleged wholesale misappropriation of public loan monies, but its premise that Conlin and the company provided no labor in exchange for payments is ultimately unconvincing. The documents that do exist refute the Water Division's position. The Water Division has not carried its burden of proof on the alleged misappropriation of SDWBA loan proceeds.

6. Other Issues

The OII asserts other conduct that, if proven, would constitute a violation of law or Commission orders. I have already determined, as an evidentiary and

[66] RT 12:1369:3-6 (Aug. 19, 2004).

issue sanction, that Conlin-Strawberry denied Commission staff access to the utility's books and records and engaged in improper accounting methods.[67]

As to other allegations, I conclude that the evidence concerning false entries for water pumps is inconclusive and any problem concerning untariffed exemptions, benefiting Conlin personally, has been cured.

VIII. California Environmental Quality Act

The possible applicability of the California Environmental Quality Act (CEQA)[68] was among the topics discussed at the PHC. The resulting scoping memo provided the parties with an opportunity to file motions or other pleadings concerning the applicability of CEQA to the relief requested in this proceeding. On January 16, 2004, the Water Division filed a Motion for Determination of Applicability of CEQA, a pleading specifically authorized by Rule 17.2. The Water Division argued that CEQA does not apply to this proceeding because it is an enforcement action. Conlin-Strawberry responded on January 30, 2004, arguing that CEQA does apply.

In my ruling of March 22, 2004, I determined that nothing in the record indicates that the Commission's efforts to secure the appointment of a receiver, under Section 855, for Conlin-Strawberry will result in a direct or reasonably foreseeable indirect physical change in the environment. Nothing in the record following the evidentiary hearing changes my view. The Commission's efforts to secure the appointment of a receiver, under Section 855, for Conlin-Strawberry is not a project under CEQA. Even if the Commission's efforts to secure the

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[67] *See* discussion at Part VI, *supra.*

[68] CAL. PUB. RES. CODE §§ 21000-21177 (2005).

appointment of a receiver were determined to be a project, the Commission's actions would be categorically exempt as a Class 21 exemption under CEQA Guidelines.[69] I, therefore, granted the Water Division's motion. For these reasons, I also decline to change my earlier ruling.

IX. Remedies

The OII directs me to determine, if any of the allegations are sustained, what fines, penalties, or other remedies are appropriate. In the following, I discuss three main remedies: penalties, reparations, and authorization to petition for a receiver.

A. Penalties

Section 2107 authorizes the Commission to impose a penalty of not less than $500 nor more than $20,000 on any utility "which fails or neglects to comply with any part or provision of any order, decision, rule, direction, demand, or requirement of the commission, ..." Section 2109 also indicates that "the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility."

The overall guidelines for determining fines and penalties were discussed by the Commission in a 1998 decision.[70] The purpose of a fine is to deter future violations by the perpetrator or others. The severity of the offense and the perpetrator's conduct guide the Commission in setting a fine that is

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[69] 14 Cal. Code Reg. § 15321 (2004).

[70] D.98-12-075, *In re* Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates, 1998 Cal. PUC LEXIS 1018 (Dec. 17, 1998); *see also* D.99-11-044, *supra* note 17.

proportionate to the offense. Also, the Commission must consider the financial resources of the perpetrator in balancing the need for deterrence with the constitutional prohibition on excessive penalties.

Conlin-Strawberry's willful failure or neglect to comply, on a repeated and continuing basis, with previous Commission decisions, as recounted herein, provides sufficient grounds for the imposition of financial penalties. Conlin's conduct as an officer and agent of the company, violation of Section 2109, would also warrant the imposition of penalties against him individually. In this case, the authorization to seek a receiver and the reparations order (*infra*), without additional financial penalties, are sufficient punishment and will work as forceful deterrents of future offenses by Conlin-Strawberry, Conlin, or others. Respondents have no doubt incurred considerable legal fees in this proceeding since October 2003. The imposition of penalties will only compound the precarious financial condition of the utility. With new management, the use of penalties simply for retribution would be counter-productive to achieving operational improvements.

Respondents advance several arguments as to why they believe that various statutes of limitations bar the recovery of any money from respondents or the imposition of any fine or penalty. Since I have determined that penalties should not be imposed, respondents arguments based on Code of Civil Procedure Sections 340 (one-year period for actions for penalties) and 343 (four-year period when no other period specified) and Section 2104 (actions to recover penalties, in respondents' view, must be brought in superior court) are not applicable.

B. Reparations

Earlier, I determined that Conlin-Strawberry's practice of collecting these surcharges violates Sections 532 and 734. Under these circumstances, the Commission is empowered by Section 734 to order reparations, "with interest from the date of collection if no discrimination will result from such reparation." I can envision no reason why reparations to ratepayers, if returning amounts illegally collected, would be discriminatory.

Respondents also invoke another statute of limitation, Section 735, and argue that this provision establishes a two-year limitation on reparations claims. Respondents are wrong. Section 735 does not prevent the Commission from ordering reparations of any illegally collected amount, regardless of the period of impermissible collection. The section only requires that the Commission file its action to enforce its order, if necessary, within one year of the order.

C. Petitioning for a Receiver

As recounted earlier, Section 855 authorizes the Commission to petition superior court for the appointment of a receiver in three instances: (a) when the water utility "is unable or unwilling to adequately serve its ratepayers"; (b) "has been actually or effectively abandoned by its owners"; or (c) "is unresponsive to the rules or order of the commission." Respondents offer their version of the legislative intent behind this section and argue that the Legislature never intended it to be used in situations like that before me.

Respondents do not offer convincing reasons for probing legislative intent or for adopting the version they offer. While "the fundamental principle of

statutory interpretation is to ascertain the intent of the Legislature,"[71] California courts first look first to the words of the statute. I do not find phrases (a) or (c), *supra*, to be vague or ambiguous. Both are commonly understood concepts. The conduct I have detailed in this decision amply supports the conclusion that the respondents have been unable or unwilling to adequately serve the utility's ratepayers, and have been unresponsive to the Commission's orders (including my discovery orders in this proceeding).

The phrase "actually or effectively abandoned" may be undefined, but respondents' proffer of legislative intent is an unreliable guide. All that respondents offer is a legislator's press release and one witness's statement. California courts have held that "[m]aterial showing the motive or understanding of an individual legislator, including the bill's author, his or her staff, or other interested persons, is generally not considered."[72] Even if respondents' version is examined, respondents' conduct falls well within the definition of "effective abandonment" offered by the witness supporting the enactment of Section 855, *e.g.*, a failure to operate (especially the failure to provide a consistent, reliable operator), a refusal to make service-related improvements ordered by the Commission (such as engineering plan).[73]

Respondents are more helpful in identifying the cases where the Commission has actually used Section 855 and found effective abandonment. In

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[71] Pennisi v. Department of Fish & Game, 97 Cal. App. 3d 268, 272 (1st Dist. 1979).

[72] Metropolitan Water Dist. v. Imperial Irrigation Dist., 80 Cal. App. 4th 1403, 1426 (2d Dist. 2000).

[73] Respondents identify the witness as a former CPUC Commissioner and general counsel.

the two contested cases identified by respondents, *Ponderosa Sky Ranch Water Co.*[74] and *Arrowhead Manor Water Co.*,[75] the water utilities violated Commission and DHS orders and, in Ponderosa's case, failed to conduct monthly water quality testing. The conduct proven in this proceeding is well within the scope of conduct recognized in *Ponderosa* and *Arrowhead* as constituting effective abandonment. The criteria of Section 855 are satisfied, and the Commission is well within its authority to seek the necessary appointment of a receiver.

In their defense, respondents argue that the appointment of a receiver for the company would be an inappropriate remedy. Respondents maintain that the system does not face an "impending catastrophe" and questions whether anything is wrong with the quantity and quality of the water.

The DHS's January 28, 2005, letter to Conlin, "Notice of Violations for Haloacetric Acid Maximum Contaminant Level," does much to dampen respondents' argument.[76] While DHS indicates that there is no immediate health risk due to exceedances of water quality standards, I am particularly concerned because DHS reports that Conlin-Strawberry failed to take required monthly water samples during January, February, and April 2004. This period is even before Jim Pingree became employed full-time elsewhere.

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[74] *In re* Ponderosa Sky Ranch Water Co., *supra* note 28.

[75] *In re* Arrowhead Manor Water Co., D.02-07-009, 2002 Cal. PUC LEXIS 439 (July 17, 2002).

[76] I take official notice of this letter, Ex. No. 123, under Evidence Code Section 455(b). I have provided the parties with notice of my intent to do so and have afforded them an opportunity to comment.

DHS' letter aside, the Commission should reject the suggestion that we wait to "pick up the pieces" after a catastrophe has occurred. I share the Water Division's concern that Conlin-Strawberry's multiple demonstrations of inattention, unreliability, lack of routine, and haphazard management will result in serious consequences to the customers of the system. Neither the Commission nor the customers may or should be confident that Conlin will responsibly manage the water system.

Respondents may be correct in their arguments that finding a receiver may be difficult and expensive. I am confident that the Water Division and Superior Court will work responsibly to achieve improved management for the water system. The Commission will carefully review, based on a future application or advice letter, the necessary rate decisions to do so. Based on discontent registered in customers' postcards to the Commission, ratepayers are likely to support actions necessary to improve system management.

The Commission should aspire to utility service that remains in the background of people's lives. When a customer flips the switch, the lights should come on. When a customer turns the faucet, healthful water should flow. Utility service should not become a constant irritant in customers' lives, *e.g.*, potholes that are never filled, tank leaks that are never sealed, telephone calls that are never answered. Customers pay reasonably for this basic service. Afforded numerous opportunities to cure these problems for over two decades, Conlin-Strawberry and Conlin have squandered these opportunities. They have proven themselves unwilling to and incapable of providing reasonable basic water service. They have forfeited any last chance to do so now.

X. Water Division Conduct

One of the issues set forth in the scoping memo is, "What extent is the financial condition of the Conlin-Strawberry Company due to the failure to receive timely rate relief from the Commission?" This issue refers to an incident in 2000 when the Water Division and Conlin-Strawberry reached impasse on the company's advice letter request for a rate increase; and an informal hearing was held before an ALJ, pursuant to an informal dispute resolution process adopted in D.92-03-092. The procedures set forth in D.92-03-092 had been incorporated in the Water Division's Standard Practice U-9-SM.[77] In August 2000, the ALJ generally ruled in favor of the company on the disputed expenses. The Water Division, however, failed to approve the advice letter or incorporate the ALJ's recommended decision in the Water Division's resolution dealing with the utility's advice letter request, as required by D.92-03-092.

Shortly after the ALJ's ruling, the Water Advisory Branch of the Water Division prepared what appears to be an internal document setting forth extensive criticism of both the merits of the ALJ's determinations and the informal dispute resolution process itself.[78] Despite these criticisms, staff still recommended in its report that a resolution be prepared for the Commission and that the resolution "should contain the final observations of the Water Division Staff; and included *within* the resolution, the ALJ's recommended decision as an

[77] Ex. No. 107: Standard Practice for Processing Informal General Rate Cases of Class B, C and D Water Utilities and the Service Guarantee Plan, Standard Practice U-9-SM (Jan. 2002).

[78] Ex. No. 86: Kerrie Evans, Staff Report on the ALJ's Ruling Dealing with Informal General Rate Case Issues of the Conlin-Strawberry Water Company (Aug. 2001).

alternative, if indeed, it is different from the Staff's recommendations."[79] Even after the Director of the Water Division promised in December 2000 that a resolution was still being prepared for the Commission's consideration,[80] no resolution was ever submitted to the Commission.

The Water Division staff failed to comply with the informal dispute resolution process set forth by the Commission in D.92-03-092—procedures the Water Division incorporated in its own Standard Practice. The process was properly invoked by Conlin-Strawberry, and the utility was entitled to have the process run its course. The Water Division has failed to provide a convincing explanation why the specified procedure was not followed. By short-circuiting the prescribed process, the Water Division effectively made a decision that was entrusted by law to the Commission and, in the process, deprived the Commission of the ALJ's proposed disposition. Despite its policy objections, the Water Division had a ministerial obligation to present the ALJ's determinations to the Commission. Inaction was inappropriate.

Because the ALJ's determinations were part of an informal dispute resolution process, they did not result in an adjudication of any of the facts or issues raised before him—especially since the Commission was never afforded an opportunity to act decisively upon a resolution transmitting his determinations. However, I find that the Water Division's conduct is not the proximate cause of the financial and management difficulties that have resulted in the numerous deficiencies and violations of orders as recounted herein. The

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[79] *Id.* at 6 (emphasis in original).

[80] Ex. 504, Water Division Director's letter (Dec. 4, 2000).

major problems that are central to my determinations today preceded the informal process conducted in 2000.

Respondents also allege they have been injured in that the quality of the record in the present proceeding is inferior to the evidence before the ALJ in the 2000 hearing. Except for documents that respondents themselves may have lost, the record in the present proceeding is far more extensive than the earlier one before the ALJ. Compared to the one-day informal hearing, the evidentiary hearing in this OII extended ten days. I find no specific indication of evidentiary detriment to respondents. The Water Division's conduct does not afford a defense, estoppel, or mitigation to the charges brought by the OII.[81]

XI. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and John E. Thorson is the assigned ALJ and the presiding officer in this proceeding.

XII. Appeal of Presiding Officer's Decision

The presiding officer's decision was filed and served on the parties to this proceeding on April 4, 2005. Pursuant to Section 1701.2, this decision will become the Commission's decision if no further action is taken within 30 days. Any interested party may appeal the presiding officer's decision to the Commission, provided that the appeal is made within 30 days of the issuance of this decision. The Commission itself may initiate a review of the decision on any grounds. The Commission's decision shall be based on the record developed by the assigned ALJ.

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[81] Respondents' Opening Brief, at 30-38, provides additional information on this incident, as does Ex. No. 86, *supra* note 78, and the testimony in this proceeding.

Findings of Fact

Customer Responsiveness

1. During a power outage in December 2002, customers were unable to reach a company representative for several days.

2. On other occasions, when other customers have left messages on the company's answering machine, their calls have not been returned.

Tank Leakages

3. In the Commission's interim decision in September 1996 (D.96-09-043), the Commission ordered Conlin-Strawberry to repair leaks in the Lower Dymond storage tank.

4. As of July 20, 2000, the leaks to the Lower Dymond storage tank had been repaired, as indicated by the Commission in Resolution W-4207.

5. In May 2004, the Lower Dymond tank, storing treated water, contained numerous holes and leaks, many of which were imperfectly plugged with broken tree branches and twigs. The holes and leaks in the tank constitute an ongoing condition of the tank.

Low Water Pressure

6. Some of the witnesses at the hearing testified as to low water pressure, but this problem seemed to be related to the combination of high-elevation water users and low river water conditions, conditions that are difficult for the company to prevent in a reasonable fashion.

Turbidity Monitor

7. The Commission has previously determined that no sanction can be imposed on Conlin-Strawberry for failing to promptly purchase the turbidity monitor as originally ordered in 1983.

8. No evidence indicates that the turbidity monitor is missing or inoperative.

Actual or Effective Abandonment

9. As the result of an evidentiary and issue sanction, Conlin is conclusively determined to have physically abandoned the water system.

10. Conlin's receipt of excessive management salaries depletes the utility of needed financial resources.

11. Conlin-Strawberry's loan repayment surcharges were payments ratepayers did not need to make in order for the company to meet its loan obligations. The excessive surcharges, however, did not cause direct harm to the utility.

Preparation of Engineering Plan

12. In 1983, the Commission ordered Conlin-Strawberry to contract with a licensed civil engineer, within 30 days of the order, "to formulate a plan for plant improvement and proper progressive maintenance" of the water system.

13. In April 2000, 17 years later, Conlin-Strawberry submitted to the Water Division a three-page letter, authored by R.F. Walter, consulting civil engineer, discussing maintenance, operations, and capital improvement needs of the water system.

14. In July 2000, the Commission determined by Resolution W-4207 that the Walter letter did not satisfy the engineering report requirement and that the company remained in noncompliance with the 1983 order. The Commission ordered full compliance by September 30, 2000.

15. No other evidence has been admitted indicating that Conlin-Strawberry has prepared and submitted the required engineering report.

Failure to Replace System Manager

16. In 1996, the Commission ordered Conlin-Strawberry to replace Danny Conlin, its current system manager, with another qualified individual who was willing to comply with past Commission and DHS orders.

17. In 1997, Conlin-Strawberry hired Jim Pingree who was properly qualified and certified to manage the system. Pingree worked responsibly to address system shortcomings.

18. In May 2004, Pingree took another full-time job at a location some distance from the Conlin-Strawberry system. While he continues to work on the system approximately three times per week, his ongoing status with Conlin-Strawberry has not been clarified.

19. In Pingree's absence, other individuals are available on a part-time basis to take water measurements, but they are not DHS certified to make water treatment adjustments.

20. While Conlin has advertised for another system operator, the daily management of the water distribution and treatment components of the system is haphazard and unreliable.

21. From May to at least September 2004, Conlin-Strawberry did not have in place a reliable, routine method of water quality and supply management by qualified and properly certified individuals.

22. In a letter to Conlin dated January 28, 2005, DHS notified respondents that, based on 2004 monitoring, the water system did not meet the following federal maximum contaminant level (MCL) treatment techniques and monitoring requirements, specifically: (a) exceeded the MCL for haloacetic acids; (b) violated the total organic carbon (TOC) percent removal requirements; and

(c) failed to take the required monthly water samples for January, February, and April 2004.

Management Salaries

23. The Water Division's expert witness, Herbert Chow, estimated that the company paid out between $145,837 (based on cash disbursements) and $162,015 (based on annual report information) in unauthorized management salaries for the 1983-2002 period. If cash disbursement figures are used, the company shows a cumulative net loss of $154,841 for the period. If the excessive salaries had been left in the company, Conlin-Strawberry would have shown a modest cumulative net loss of $9,004 for the 19-year period (with individual years varying from almost $18,000 net loss (1987) to almost $16,000 net gain (1984)).

24. Since 1983, the Commission's rate-of-return decisions and resolutions through 2003 have authorized the recovery of approximately $283,000. This is close to the $293,875 that Chow estimates was paid to Conlin in management salaries during those years.

25. The Water Division has failed establish that Conlin engaged in wholesale looting of the company through excessive management salaries.

26. Effective January 1, 1985, the Commission adopted a Uniform System of Account for Class B, C, and D water utilities including Conlin-Strawberry (a Class D company). The Uniform System of Accounts requires that management salaries, which are "chargeable to utility operations," be posted to Account No. 671. Dividends, however, are to be charged to Account 215, "Retained Earnings."

27. Since 1983, Conlin-Strawberry was consistently showing negative retained earnings that ultimately totaled $80,000 in 2002. The company had no retained earnings from which to draw dividend payments to its sole shareholder, Danny

Conlin. By admittedly taking larger salaries than set forth in test years reviewed by the Commission, however, Conlin was in many years receiving a preference over competing operating expenses.

28. Under this arrangement, Conlin's excess salary payments directly competed with other necessary operating expenses and have contributed to the decline of the water system.

Surcharges

29. Since 1983, Conlin-Strawberry has collected and received different compensation than specified in its schedules on file and in effect at the time. All the company's tariffs since the Commission approved the surcharge in 1983 carried the provision, "The surcharge is in addition to the regular metered water bill. The surcharge must be identified on each bill. The surcharge is specifically for the repayment of the California Safe Drinking Water Bond Act loan authorized by Decision 83-05-052." The company, however, was collecting and using portions of the surcharge for purposes other than repayment of the loan.

30. The amount of money collected from ratepayers as surcharges but not used for repayment of the SDWBA loan as required by D.83-05-052 totals $64,842 for the period April 1984 through December 2003. The interest on this amount is an additional $41,716, for a total of $106,558.

Misappropriation of Loan Proceeds

31. The Commission authorized respondents to borrow a total of $411,200 from the DWR in 1983 to satisfy DHS' requirements. In 1986, the Commission approved an additional loan of $51,500 because pipeline installation in rocky ground exceeded original estimates.

32. In auditing loan proceeds, Chow concludes that $59,177 paid to Conlin is unsubstantiated because Conlin has "failed to specify and document the SDWBA

costs or work claimed for this amount." Of the $269,608 loan proceeds paid to the Conlin-Strawberry, Chow concludes that $224,612 is "unsubstantiated."

33. Chow has recognized as "substantiated" only payments from the loan disbursement account to outside contractors or payments from the company to outside contractors and suppliers. Chow effectively considers any labor provided by Conlin, his employees, or employees of the company to be "unsubstantiated" expenditures.

34. Chow's position is ultimately untenable because no one contests that the improvements to the water system were made substantially as proposed, DWR has not registered concerned about the loan proceeds, and other evidence indicates that respondents did incur legitimate labor costs on the improvements.

Other Issues

35. As the result of an evidentiary and issue sanction, Conlin is conclusively determined to have denied Commission staff access to utility books and records.

36. At all times relevant to these factual determinations, Conlin was an officer and performed the duties of an agent of Conlin-Strawberry.

CEQA

37. The Commission's efforts to secure the appointment of a receiver, under Section 855, for Conlin-Strawberry will not result in a direct or reasonably foreseeable indirect physical change in the environment.

Remedies

38. While respondents' proven conduct provides sufficient grounds for the imposition of financial penalties, the authorization to seek a receiver and the reparations order, without additional financial penalties, are sufficient punishment and will work as forceful deterrents of future offenses by Conlin-

Strawberry, Conlin, or others. The imposition of penalties will only compound the precarious financial condition of the utility.

39. Ratepayers paid unnecessary loan surcharge payments that should be returned to them through reparations.

40. A receiver is necessary because Conlin-Strawberry's multiple demonstrations of inattention, unreliability, lack of routine, haphazard management, and violation of law and Commission's orders creates a situation where it is reasonable to expect that serious adverse consequences to the customers of the system may follow.

Conclusions of Law

Customer Responsiveness

1. Due to deficiencies after September 1996, Conlin-Strawberry has violated D.83-05-052 by failing to maintain a workable, reliable telephone answering system or service.

2. Conlin-Strawberry has violated GO 103 by failing to provide a reliable telephone answering system and, further, by failing to respond to customer complains and inquiries in a prompt manner.

Tank Leakages

3. D.96-09-043 imposed a continuing reasonable obligation on Conlin-Strawberry to seal in a professional manner new leaks and holes in the system's storage tanks, including the Lower Dymond tank.

4. By failing to reasonably seal leaks and holes in the system's storage tanks, Conlin-Strawberry has violated the Commission's order as set forth in D.96-09-043.

Low Water Pressure

5. No present violation of the Commission's rules and orders concerning low water pressure exists.

Turbidity Monitor

6. The evidence does not establish the violation of any legal requirement concerning the turbidity monitor.

Actual or Effective Abandonment

7. As the result of an evidentiary and issue sanction, it is conclusively determined that Conlin, in violation of Section 855, actually or effectively abandoned the Conlin-Strawberry water utility.

8. Conlin's receipt of excessive management salaries also is an effective abandonment of the Conlin-Strawberry water utility, in violation of Section 855, since it depleted the utility of financial resources.

Preparation of Engineering Plan

9. In adopting Resolution W-4207, the Commission conclusively determined that, as July 20, 2000, Conlin-Strawberry had failed to satisfy the Commission's 1983 order to prepare and submit an acceptable engineering report.

10. Since no engineering report has been prepared and submitted since July 20, 2000, Conlin-Strawberry remains in violation of the Commission's 1983 order.

Failure to Replace System Manager

11. By failing to have in place, on more than a temporary basis during most of 2004, a qualified and properly certified operator or manager willing to comply with past Commission and DHS orders, respondents are in substantial and continuing violation of D.96-09-043.

Management Salaries

12. Conlin-Strawberry has failed to maintain its records according to the Uniform System of Account for Class B, C, and D water utilities, as ordered by the Commission.

Surcharges

13. By collecting and receiving different compensation than specified in its schedules on file and in effect at the time, Conlin-Strawberry has violated Section 532.

14. By collecting and receiving different compensation than specified in its schedules on file and in effect at the time, in violation of Section 532, Conlin-Strawberry was also charging unreasonable and excessive rates in violation of Section 734.

15. As provided by Section 735, the Commission should order reparations to ratepayers.

Misappropriation of Loan Proceeds

16. The Water Division has not carried its burden of proof on the alleged misappropriation of SDWBA loan proceeds.

Other Issues

17. Respondents denied Commission staff access to utility books and records in violation of Section 791 and GO 28.

CEQA

18. The Commission's efforts to secure the appointment of a receiver, under Section 855, for Conlin-Strawberry is not a project under CEQA.

19. Even if the Commission's efforts to secure the appointment of a receiver were determined to be a project, the Commission's actions would be

categorically exempt as a Class 21 exemption under CEQA Guidelines, 14 Cal. Code Reg. § 15321.

Remedies

20. While respondents' conduct provides sufficient grounds for the imposition of financial penalties, such penalties should not now be imposed.

21. The conditions of Section 735 are satisfied; the Commission should order reparations of loan surcharge payments to ratepayers.

22. The conditions of Section 855 are satisfied; the Commission should petition superior court for the appointment of a receiver for Conlin-Strawberry.

23. In all violations determined herein, Conlin was the officer and agent of Conlin-Strawberry and, additionally, was in violation of Section 2109.

O R D E R

1. The General Counsel shall proceed immediately to petition the Superior Court, Tuolumne County, for the appointment of a receiver to assume possession of Conlin-Strawberry Water Company Inc. (Conlin-Strawberry *or* company) and all its assets and to operate the water system upon such terms and conditions as the court shall prescribe.

2. Conlin-Strawberry is ordered to pay reparations and interest to ratepayers of all illegally collected surcharges from 1983 to the present. Each ratepayer will be entitled to reparations equivalent to the amount illegally collected from that ratepayer plus interest on each illegal collection. Interest will be calculated for each month during this period by use of the average balance method and the then-applicable bank interest rate of the fiscal agent appointed pursuant to Decision 83-05-052.

3. Conlin-Strawberry shall undertake reasonable efforts to locate and pay reparations to persons who are no longer ratepayers but from whom illegal surcharges were collected in the past.

4. In the event that persons entitled to reparations cannot be located, those unpaid reparations will be applied to the unpaid principal of Conlin-Strawberry's California Safe Drinking Water Bond Act loan. Any excess shall be disposed of pursuant to the escheat laws of the state.

5. Before making any reparation payments, Conlin-Strawberry shall submit its reparation plan (including identified recipients, payment amounts, and interest calculations) to the Water Division for review and receive the Water Division's written permission to proceed with reparation payments.

6. The receiver appointed by the superior court may apply, by advice letter, for general ratemaking in the manner provided for Class D water utilities. The receiver may apply, by way of advice letter or application, for other relief that the Commission may appropriately provide.

7. The receiver also may apply, by advice letter, for suspension of the reparation payments (or any nondiscriminatory portion of them) if necessary to improve the company's financial viability and quality of service. The Water Division will prepare a resolution for the Commission concerning any suspension in reparation payments.

8. Pending the appointment of a receiver, orders of a court of competent jurisdiction, or further Commission orders, Conlin-Strawberry and Danny T. Conlin, its owner (sole shareholder) and operator, shall not remove (other than in the normal course of business), misdirect, or intentionally damage any asset of the water system.

9. The Water Division's motion for additional evidentiary or issue sanctions for respondents' alleged failure to provide employee records is denied.

10. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.